Hastings Business Law Journal

Volume 17
Number 1 *Winter 2021*

Article 3

Winter 2021

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Recommended Citation

Sophia Duffy and Steve Parrish, *You Say Fiduciary, I Say Binary: A Review and Recommendation of Robo-Advisors and the Fiduciary and Best Interest Standards*, 17 Hastings Bus. L.J. 3 (2021).
Available at: https://repository.uchastings.edu/hastings_business_law_journal/vol17/iss1/3

You Say Fiduciary, I Say Binary: A Review and Recommendation of Robo-Advisors and the Fiduciary and Best Interest Standards

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ABSTRACT

Automated investment advice platforms, also known as "robo-advisors", are investment advice tools that have quickly grown in popularity over the last decade. These sophisticated software platforms allow individuals to receive low-cost financial advice about various financial planning goals, such as creating or adjusting investment portfolios, retirement planning, education funding, and the like, simply by entering asset and demographic information into an online platform. The robo-advisors automatically generate the financial advice based on the data inputs with little to no involvement from a human financial advisor. The allure of these low-cost, easily accessible robo-advisors has captured a large segment of the consumer market. As robo-advisors grow, the regulatory outlook for investment advisors is changing. The scope of fiduciary duty is encompassing more and more areas of financial advice. In addition, a newcomer onto the liability field, known as the "best interest" standard, has elevated the liability standard for broker-dealers to a fiduciary-like status. This has created a contrast between automated, generic advice and the regulatory push towards personalized, fiduciary advice. In this paper, we determine whether robo-advisors are able to meet the liability standards set

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forth by regulators and recommend the ways in which robo-advisors can best serve consumers.

We first discuss the fiduciary and best interest standards for investment advisors in depth by reviewing statutory language, whitepapers and guidance issued by various regulating bodies, and thought leadership put forth by industry experts. Next, we evaluate whether robo-advisors are able to meet these standards by reviewing guidance from regulatory agencies and commentary from thought leaders, peer-reviewed articles, and regulators. We find that robo-advisors can meet the fiduciary standard when providing limited-scope investment advice, and can meet the best-interest standard in most cases. However, robo-advisors may not rise to a fiduciary level when providing broad, comprehensive financial advice, such as preparation of an estate plan, retirement plan, or overall wealth management. In our conclusion, we propose a clarification of regulatory language to 1) recommend the specific services for which robo-advisors are best or better-suited compared to human investment advisors, and 2) prohibit robo-advisors from performing services for which they are ill-suited.

INTRODUCTION

Over the past decade, robo-advisors, or automated systems for providing financial advice and services, are becoming more and more popular.[1] According to research conducted by Business Insider Intelligence, experts estimate that robo-advising platforms will manage $1 trillion in assets in 2020, and $4.6 trillion in assets by 2022.[2] This is setting up an interesting challenge in the practice of financial advice. Historically, financial advice was provided by human advisors[3] who used automated systems as a supplementary tool. For example, a human advisor would commonly use software to generate an ideal investment portfolio allocation for a client based on their spending goals, lifestyle, and retirement time horizon. In recent years, these automated tools have become highly sophisticated, so much so that some services can be provided entirely by the

1. Marguerita Cheng, *The Future of Wealthtech*, FORBES, (Feb. 19, 2019, 9:00 AM), https://www.forbes.com/sites/margueritacheng/2019/02/19/the-future-of-wealthtech/#3374149c35e6 (There are currently over 200 robo-advising platforms registered in the United States).

2. Sarah Kocianski, *The Evolution of Robo-Advising: How Automated Investment Products are Disrupting and Enhancing the Wealth Management Industry*, BUSINESS INSIDER, (July 3, 2017, 10:31 AM); https://www.businessinsider.com/the-evolution-of-robo-advising-report-2017-7?IR=T.

3. The term "advisor" is used interchangeably with "adviser." Though the SEC prefers to use "-er", the more common industry usage is "-or". We will use the "-or" ending for consistency in this paper.

software without any human involvement. We will refer to these systems as "pure robo-advisors" in this paper (as opposed to a hybrid robo-advisor model, which would involve some human interaction). A challenge this advancement in technology represents is how to regulate financial services when some or all of the advice derives from a computer. While technology enables automated advisor services to be more widely accessible, the regulatory landscape seems to be requiring more personalized advisor-client relationships (which are more costly than less personalized advice). Numerous federal and state authorities, as well as industry regulatory bodies, have enacted or proposed regulations and standards to raise the level of liability for financial professionals providing different types of advisory services so that more of these professionals are held to a fiduciary or fiduciary-like standard.[4]

This contrast between automated advice and the regulatory trend towards human-centered advice spurs two questions: First, what legal standard applies to robo-advisors? Second, what types of advisory services can a robo-advisor provide while still meeting the applicable legal standard? In this paper, we first look at the general regulatory environment for financial service professionals, recognizing that much of the law contemplates that the advisor is assumed to be human. We then consider where pure robo-advising platforms can best fit within this regulatory framework. Our conclusion will be that pure robo-advice works best in a limited scope client engagement such as investment advice and monitoring. Lastly, we propose changes to the regulatory statutes that would enable robo-advisors to meet the applicable standard most effectively and clarify how robo-advisors should be utilized to provide financial advice.

A note is in order concerning the terminology to be used in describing the person, firm or computer providing advice to the client. The term "advisor" and "adviser" have historically had both identical and differing definitions, depending on the statute or regulation involved.[5] And, as will be

4. New York, California, New Jersey, Maine, and other states have proposed new fiduciary standards ranging from a comprehensive standard for all financial professionals to fiduciary liability when providing advice in specific situations. *See* Kevin L. Walsh and David N. Levine, *A New Litigation Saga Begins for Another Best Interest Rule*, INVESTMENTNEWS, Sept. 10, 2019, 1:50 PM), https://www.investmentnews.com/article/20190910/BLOG09/190919995/a-new-litigation-saga-begins-for-another-best-interest-rule; *see also* The CFP Board will implement a fiduciary standard for all Certified Financial Professional designation holders in 2019; *see also Directors of CFP Board Set Enforcement Date for New Code and Standards*, CFP Board, (July 16, 2019), https://www.cfp.net/news-events/latest-news/2019/07/16/directors-of-cfp-board-set-enforcement-date-for-new-'code-and-standards'.

5. Michael Kitces, *Financial Adviser vs. Advisor: What's the Difference?*, NERD'S EYE VIEW, (Aug 18, 2016), https://www.kitces.com/blog/financial-adviser-vs-advisor-vs-finan

discussed below, with the SEC a current distinction exists between whether the provider of advice can be called an "advisor" or "broker". For this paper, we are focused on financial advice, in whatever form it is provided. Consequently, and to make the analysis clearer, we will use the general term "advisor" to indicate an entity (human or robo) which is providing financial information and services to a client.

THE REGULATORY LANDSCAPE FOR FINANCIAL PROFESSIONALS

The regulation of financial advisors began long before the presence of computers. In fact, the landscape of federal regulations regarding the liability of financial professionals has been evolving for almost a century, beginning in 1934 with the enactment of the Securities and Exchange Act.[6] In recent years, the pace of regulatory change has kicked into high gear. This regulatory acceleration is largely spurred by the growing retirement crisis and highly publicized ethical failures in the financial sector, such as the Madoff Ponzi scheme and the 2007-2008 mortgage crisis that triggered a U.S. recession and wreaked havoc among global financial markets.[7] Governmental agencies have increasingly pushed for more regulations to protect consumers of financial services from bad actors in the financial profession who recommended poor, and financially devastating, investments simply to earn higher income or receive other benefits. Note that most of this regulatory activity has been focused on human-based advisors.

A history of recent regulatory activity shows mixed results in achieving this outcome. While those financial professionals commonly deemed financial "advisors" have long been held to a fiduciary standard,[8] the

cial-planner-whats-the-difference/ (It's worth noting in terms of registering as an investment adviser, and being subject to the legal standards of an investment adviser, it doesn't actually matter whether you call yourself advisor with an O-R or adviser with an E-R.)

6. Mark Schoeff, Jr., *A Historical Timeline of Fiduciary Duty for Financial Advice*, INVESTMENTNEWS, (Mar. 16, 2016), https://www.investmentnews.com/historical-timeline-of-fiduciary-duty-for-financial-advice-66755.

7. "In the wake of the 2008 financial crisis, Congress recognized the need to ensure that retail investors can readily access unbiased advice from all financial professionals, regardless of whether that advice comes from an investment adviser or broker-dealer." *See Attorneys General of New York, California, Connecticut, et al., Comments to Proposed Best Interest Regulation, Securities and Exchange Commission*, (Aug. 7, 2018), https://www.sec.gov/comments/s7-07-18/s70718-4185784-172673.pdf.

8. The Investment Advisors Act of 1940 requires individuals who provide investment advice for compensation to refrain from fraud, deceptive practices, or material misstatements and omissions of information. *See* Investment Advisor Act of 1940, 15 U.S.C. § 206 (1940); Although the term "fiduciary" is not explicit in the statute, it was first used to define the standard in the seminal case regarding advisor liability, SEC v. Capital Gains Research

Securities and Exchange Commission (SEC) and the Department of Labor (DOL) recently attempted, but were ultimately unable, to enact a comprehensive fiduciary standard for all financial professionals.[9] The fiduciary standard is a highly protective standard of liability for services that require an agent (in this context, the financial professional), to act in the best interests of a principal (the client).[10] After the federal efforts to impose a uniform fiduciary standard failed, many states and other regulating bodies have opted to take action on their own.[11] These regulations aim to heighten the liability standard for any financial services professionals who provide advice, including those that are not defined as "advisors" under the 1940 Act. For example, under these attempts, those selling a life insurance policy,[12]

Bureau, Inc., 375 U.S. 180, 191 (1963). ("The Investment Advisers Act of 1940 thus reflects a congressional recognition 'of the delicate fiduciary nature of an investment advisory relationship"), and again in Santa Fe Industries Inc. v. Green, 97, U.S. 1292, 1295 (1977); *see also* Megan Ji, Note, *Are Robots Good Fiduciaries? Regulating Robo-Advisors Under the Investment Advisors Act of 1940*, 117 COLUMBIA L. REV. 1543, 1548 (2018); *see also* Lorna A. Schnase, *An Investment Adviser's Fiduciary Duty*, The Fiduciary Institute, 7 (Aug. 1 2010), https://www.thefiduciaryinstitute.org/wp-content/uploads/2013/02/lornaschnaseFiduciary-Duty-Paper.pdf.

9. In 2016, the Department of Labor proposed regulations that would require all financial professionals working with retirement plans or providing advice related to retirement to act as fiduciaries towards the plan participants. After vocal opposition by industry groups, numerous delays, and a change in the Presidency to a less regulatory-friendly regime, the "DOL fiduciary rule" was vacated by the Fifth Circuit Court of Appeals in 2018. The court vacated the proposed regulation on several grounds, including an unreasonable and arbitrary and capricious exercise of administrative power by the DOL, DOL regulatory overreach, and inconsistency with established regulations. *See* Chamber of Commerce of the USA, et al., v. Department of Labor, et al., 17-10238 F.3d 360, 363, 384-385 (5th Cir. App. Ct. 1976); *see also* Melanie Waddell *5th Circuit Issues Order to Kill DOL Fiduciary Rule*, THINK ADVISOR, (June 21, 2018, 12:54 PM), https://www.thinkadvisor.com/2018/06/21/5th-circuit-orders-dol-fiduciary-rule-vacated/?slreturn=20191116123828.

10. The Investment Advisors Act of 1940 requires individuals who provide investment advice for compensation to refrain from fraud, deceptive practices, or material misstatements and omissions of information. *See* 15 U.S.C. § 206. Although the term "fiduciary" is not explicit in the statute, it was first used to define the standard in the seminal case regarding advisor liability. *See Capital Gains Research,* 375 U.S. at 191. And again in *Santa Fe Industries*, 430 U.S. at 1295; *see also* Ji, *supra* note 7, at 1549.

11. *See* Walsh, *supra* note 4; *see also* The CFP Board will implement a fiduciary standard for all Certified Financial Professional designation holders in 2019; s*ee also Directors of CFP Board Set Enforcement Date for New Code and Standards*, CFP Board, (July 16, 2019), https://www.cfp.net/news-events/latest-news/2019/07/16/directors-of-cfp-board-set-enforcement-date-for-new-'code-and-standards'.

12. *See* New York Superintendent of Financial Services, First Amendment to 11 NYCRR 224 (July 17, 2018), https://www.dfs.ny.gov/docs/insurance/r_finala/2018/rf187a1txt.pdf (proposes to hold individuals selling or providing advice related to life insurance policies to a best interest standard that is similar to a fiduciary standard).

advising or working with retirement plans,[13] individuals holding the CFP® mark,[14] and most notably, broker-dealers who perform transactions on behalf of a client,[15] are or will be held to a fiduciary or a similar "best interest" standard.

The result of these myriad efforts is an ever-evolving and complicated jumble of regulations that is difficult for the average financial professional to understand. Regulators have acknowledged this fact and have stated that the various regulating bodies should work together to clarify and streamline the liability standards.[16] Though this area continues to change at a rapid pace, a trend has clearly emerged towards increasing liability to a fiduciary-like standard for all financial professionals providing advice to individual consumers. Two main categories of liability have evolved under these regulations: a broadened traditional fiduciary standard, and a new best-interest standard.

In this section, we provide a summary to highlight the complexity caused by the volume of regulations that cover this area, but we will focus more heavily on the fiduciary standard for three reasons: 1) the fiduciary standard applies most broadly to those providing comprehensive financial advice to individual clients, 2) the best interest standard is similar to the fiduciary standard in many ways so we will only highlight the primary differences; and 3) the regulation of robo-advisors, discussed later in this paper, will most likely fall under the fiduciary standard.

13. *See* U.S. Dep't of Labor, Employee Benefits and Security Admin., Meeting Your Fiduciary Responsibilities (Sept. 2017), https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/publications/meeting-your-fiduciary-responsibilities.pdf. (Any individual making recommendations to an employer-sponsored retirement plan and charging a fee is a fiduciary under the ERISA regulation.).

14. *See*, Certified Financial Planner Board of Standards, *Directors of CFP Board Set Enforcement Date for New Code and Standards*, CFP Board (July 16, 2019), https://www.cfp.net/news-events/latest-news/2019/07/16/directors-of-cfp-board-set-enforcement-date-fo r-new-'code-and-standards' (The CFP Board will implement a fiduciary standard for all Certified Financial Professional designation holders in 2019.).

15. *See* 15 U.S.C. § 202(a)(11)(c) 1940 (Historically, broker-dealers were not defined as advisors under the 1940 Act as long as they only provided advice "tangential" to performing some transaction on behalf of a client. "… any broker or dealer whose performance of such services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor" is not an advisor.).

16. *See*, Tobias Salinger, *How Firms and Regulators Are Preparing for Reg BI's 'Significant Impact'*, FINANCIAL PLANNING (Sept. 10 2019, 1:19 PM), https://www.financial-planning.com/news/how-finra-sec-nasaa-are-implementing-reg-bi; *see also*, Mark Schoeff Jr., *FINRA Will Defer to SEC on Interpreting Best Interest Rule*, INVESTMENTNEWS (Sep. 9 2019, 4:17 PM), https://www.investmentnews.com/article/20190909/FREE/190909946/finra-will-defer-to-sec-on-interpreting-best-interest-rule.

FIDUCIARY DUTY FOR INVESTMENT ADVISORS

Financial advisors, defined as individuals who provide financial advice for a fee, have been held to a fiduciary standard since the passage of the Investment Advisors Act of 1940.[17] When this law was enacted, there were no computers, and naturally the law assumed it was addressing "individuals" who provide financial advice. Over the years, countless interpretations and refinements of the fiduciary standard by courts and regulatory bodies have resulted in a fairly well-established body of law regarding what specific duties constitute a financial advisor's fiduciary duty.[18] Most authorities agree that fiduciary duty is comprised of, at minimum, a duty of care and a duty of loyalty.[19]

DUTY OF CARE

> The duty of care requires the financial advisor to provide prudent recommendations to a client that:
>
> are based on appropriate and diligent research regarding the investments recommended and client's personal circumstances and goals;
> align with the client's level of financial sophistication;
> are appropriately and reasonably priced;
> follow customary and normal professional practices, and

17. *See*, 15 U.S.C. § 202(a)(11)(c) 1940 (The Investment Advisors Act of 1940 requires individuals who provide investment advice for compensation to refrain from fraud, deceptive practices, or material misstatements and omissions of information.); *see also*, *Capital Gains Research*, 375 U.S. at 282-83 (1963) ("The Investment Advisers Act of 1940 thus reflects a congressional recognition 'of the delicate fiduciary nature of an investment advisory relationship"); *see also*, *Santa Fe Industries*, 97 S. Ct. at 1295 (1977); *Accord*, Megan Jo, *Are Robots Good Fiduciaries? Regulating Investment Advisors Under the Investment Advisors Act of 1940*, 117 COLUM. L. REV. 1543, 1549 (2018).

18. *See generally*, Megan Jo, *Are Robots Good Fiduciaries? Regulating Investment Advisors Under the Investment Advisors Act of 1940*, 117 COLUM. L. REV. 1543, 1549-1551 (2018) (for an in-depth analysis on the history of fiduciary interpretations regarding financial advisors).

19. *See*, SEC, *Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, 17 C.F.R. § 276, 2 (2019) https://www.sec.gov/rules/interp/2019/ia-5248.pdf; *see also* Cornell Law School, Legal Information Institute, *Definition of Fiduciary Duty*, https://www.law.cornell.edu/wex/fiduciary_duty (last visited Oct. 21, 2020); *see also* 37 Am. Jur. 2d *Fraud and Deceit* § 35 (2020) ("Where a confidential or fiduciary relationship exists, it is the duty of the person in whom the confidence is reposed to exercise the utmost good faith in the transaction with due regard to the interests of the one reposing confidence…(a) fiduciary duty is a duty of loyalty.").

include ongoing monitoring of client accounts as appropriate within the scope of the client relationship.[20]

Regarding the first two factors noted above, the duty of care includes doing reasonable inquiry into the client's circumstances and objectives, so that the advisor can formulate appropriate advice in the client's best interest.[21] The advisor also needs to make a determination regarding how financially sophisticated the client is, and whether the client can truly understand the recommendations being made.[22] The SEC, when providing guidance regarding interpretation of the duty of care, commented that this reasonable inquiry would include

> "whether the adviser is aware of events that have occurred that could render inaccurate or incomplete the investment profile on which the adviser currently bases its advice. For instance, in the case of a financial plan where the investment adviser also provides advice on an ongoing basis, a change in the relevant tax law or knowledge that the client has retired or experienced a change in marital status could trigger an obligation to make a new inquiry."[23]

The critical phrase in the SEC's interpretation is whether the advisor "is aware of" important information which may impact the client.[24] This indicates that the duty of care would seem to include not only a responsibility to gather information from the client, but to act upon any other information the advisor possesses which may be relevant, such as a new tax regulation that would impact the client, or if the advisor notices something about the client that the client would not have otherwise shared. For example, if an advisor notices a client has lost weight, appears unwell, and exhibits other signs of sickness, the advisor may inquire about the client's health. Upon learning that the client has been diagnosed with a severe illness, the advisor should recommend the client update their medical documents, any powers of attorney, healthcare directives, and review their estate plan. Or, upon simply asking "How are the kids?" the advisor may learn that the client's son has been battling addiction, which may lead the advisor to recommend removing the son from a joint account to limit his access to cash.

20. *Id*. at 12-21; *see also*, Lorna A. Schnase, *An Investment Adviser's Fiduciary Duty*, The Fiduciary Institute, 7 (Aug. 1, 2010), https://www.thefiduciaryinstitute.org/wp-content/uploads/2013/02/lornaschnaseFiduciary-Duty-Paper.pdf.

21. *See* SEC, *Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, 17 C.F.R. § 276, 12-21 (2019) https://www.sec.gov/rules/interp/2019/ia-5248.pdf. https://www.sec.gov/rules/interp/2019/ia-5248.pdf.

22. *See* Schnase, *supra* note 7, at 7.

23. *See* SEC, *supra* note 18, at 14.

24. *See* SEC, *supra* note 18, at 14.

While failure to make small talk may not constitute a breach of fiduciary duty,[25] many experts in the fiduciary space agree that this ability to use judgement, pick up on contextual clues, and ask probing questions is critical to satisfy the fiduciary duty.[26] Clearly, an advisor is most effective as a fiduciary when he or she acts upon information gathered through formal *and* informal means, such as the advisor's intuition or personal experience with the client.[27] For example, attorneys, who also hold fiduciary status, are *required* to act if they notice signs of cognitive decline in their elderly or ailing clients.[28] While financial advisors are not *required* to do the same, the passage of statutory protections for advisors who choose to act to protect clients upon seeing a client's cognitive decline, such as the Senior Safe Act and FINRA regulations, indicate that public policy favors advisors who act upon their reasonably-based intuition.[29] As we discuss later, with the advent of robo-advising, one must question whether the current state of technology allows a computer to fulfill these kinds of duties to clients.

The SEC has also clarified that the duty of care requires the advisor to "provide advice and monitoring at a frequency that is in the best interest of the client, taking into account the scope of the agreed relationship." [30] The SEC provided an example of an advisor compensated via a periodic asset-based fee, and stated this relationship would require the advisor to provide extensive monitoring and advising.[31] Conversely, the SEC clarified that in a limited relationship, "such as for the provision of a one-time financial plan for a one-time fee",[32] the advisor would not likely have any ongoing monitoring responsibilities.[33] From this interpretation, we

25. Under current regulatory standards, an advisor is not required to nor considered capable of assessing mental capacity for a client, even if signs of declining mental capacity are clear, although defrauding or otherwise taking advantage of a mentally diminished client is a clear breach of fiduciary duty. *See* Schnase, *supra* note 7, at 15–16.

26. *See* Ji, *supra* note 7, at 1567.

27. Interestingly, while an advisor has no duty to act proactively if they see a client exhibiting signs of cognitive decline, many firms train advisors to spot and act upon the signs. *See* Schnase *supra*, note 7, at 16. Attorneys, on the other hand, are required to report or follow up on signs of mental decline in their clients. This "exercise of judgment, even if it is merely the incipient awareness that [']something is not right,['] is itself an assessment." *See also* AM. BAR ASS'N COMM'N ON LAW & AGING & AM. PSYCHOLOGICAL ASS'N, ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITY: A HANDBOOK FOR LAWYERS 1 (2005).

28. Attorneys are required to look for signs of mental decline in their clients for two reasons: to determine whether clients have legal capacity to enter into a contract for services with the attorney, and to determine whether the client has capacity to complete the legal transactions that the representation may require. *See* AM. BAR ASS'N COMM'N ON LAW & AGING & AM. PSYCHOLOGICAL ASS'N, *supra* note 26.

29. Press Release, Sec. & Exch., SEC, NASAA, and FINRA Issue Senior Safe Act Fact Sheet to Help Promote Greater Reporting of Suspected Senior Financial Exploitation (May 23, 2019), https://www.sec.gov/news/press-release/2019-75.

30. *See* SEC, *supra* note 18, at 20–21.

31. *See id.*

32. *See id.* at 20-21.

33. *See id.* at 20-21.

can establish that an advisor's fiduciary duty can be broad or limited, depending on the scope of the agreement. A broad fiduciary duty would relate to more comprehensive and ongoing services, while a limited scope relationship would likely be applicable to a one-time service, or service related to specific portfolio or investment.

In the next section, we note that to the extent the financial plan is confined to the development and recommendation of an investment portfolio (i.e., a limited scope engagement), we believe that a robo-advisor is capable of fulfilling this fiduciary duty of care. Further, if there is an expectation of on-going investment monitoring, we also believe that robo-advisors are not only capable of fulfilling this fiduciary duty, but in some respects even better than the human advisor in doing so.

DUTY OF LOYALTY

The other primary duty under an advisor's fiduciary standard is the duty of loyalty.[34] The duty of loyalty requires an advisor to act in the best interest of the client by seeking out the best outcome, refraining from any self-dealing or creating any conflicts of interest that may harm the client, and to disclose any material and relevant information to the client.[35]

To satisfy the duty of loyalty, an advisor must:

> act in the client's best interests;
> place the client's interests above the advisor's own interests; and
> avoid or mitigate conflicts of interest.[36]

The third factor, avoiding conflicts of interest, is an oft-litigated issue and is the one we will focus on in this discussion. Some conflicts are clear, while others fall into a gray-area and the advisor must make a judgement call as to what actions are required to satisfy the fiduciary duty. If an advisor cannot or chooses not to avoid a conflict of interest, the advisor may obtain the client's informed consent to continue with the conflicted action in most cases, after providing "full and frank" disclosure about the conflict.[37] However, the law is clear that an advisor cannot bypass fiduciary responsibility by simply obtaining the client's consent for all conflicts, rather, an advisor must eliminate or mitigate conflicts if they are not able to be adequately disclosed.[38] Conflicted actions may include charging clients for broker research that the advisor then utilizes for other clients, recommending investment in mutual funds managed by the advisor (which would result in the

34. *See id.* at 2.
35. *See id.* at 21-29.
36. *See id.*
37. *See* Schnase, *supra* note 7, at 11-12.
38. *See* SEC, *supra* note 18, at 28.

advisor receiving two fees from the client – the client's advisory fee and fees charged by the mutual fund), and investing in the same securities as an advisor's clients.[39]

When we start applying the standard of loyalty to the world of the robo-advisor, it is arguable that a properly programmed robo-advisor may actually be better at avoiding some conflicts of interest than the human advisor. As we discuss below, greed, avarice, and personal bias are human characteristics that can potentially be deprogrammed from a robo-advice platform. In addition, detecting conflicts of interest is possibly more straightforward and easier on a robo-advice platform, compared to a human advisor.

THE EXPANSION OF FIDUCIARY LIABILITY

Historically, financial professionals who did not meet the definition of an advisor under the Investment Advisor Act of 1940 were not held to a fiduciary standard.[40] Rather, registered representatives who were not advisors (e,g., brokers working for a broker-dealer), were subject to a lesser "suitability" standard. [41] Financial professionals who were not under the purview of securities law were held to a similar suitability standard or some other non-fiduciary standard.[42] In recent years, federal regulators have taken measures to protect the public from all sources of low quality or harmful financial advice by advocating for a broader fiduciary standard that would include more individuals who provide financial advice.[43] However, these efforts have been met with vocal and powerful opposition from lobbying organizations, industry investment, and advisory giants.[44] In 2015, the Department of Labor proposed a fiduciary standard for all financial professionals within its purview, including broker-dealers.[45] The regulation was effectively killed by the Fifth Circuit Court of Appeals in 2018 for being overbroad and beyond the DOL's mandate.[46]

There are, however, many states and other regulatory bodies that have taken up the cause in the wake of the DOL's defeat, and they have enacted or proposed regulations to impose a fiduciary standard across many more areas of financial

39. *See* Schnase, *supra* note 7, at 11-12.

40. 15 U.S.C. § 202(a)(11)(c), *See* Schoeff, *supra* note 5.

41. *See*, SEC, *Commission Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer Exclusion from the Definition of Investment Advisor*, 17 C.F.R. § 276 (2019), https://www.sec.gov/rules/interp/2019/ia-5249.pdf (FINRA is the primary regulatory body for anyone trading public securities, and has instituted a separate liability standard, commonly known as the Suitability Standard, for broker-dealers trading securities but who do not meet the definition of an advisor under the 1940 Act). *See also* Schoeff, *supra* note 5.

42. *See id.*

43. *See supra* note 40.

44. *See* Schoeff, *supra* note 5.

45. *See id.*

46. Christopher Robbins, *5th Circuit Closes Book On Fiduciary Rule*, FINANCIAL ADVISOR MAGAZINE, (June 21, 2018), https://www.fa-mag.com/news/5th-circuit-decision-signals-end-of-dol-fiduciary-rule-39369.html.

practice.[47] Further, even though the DOL failed to expand the reach of its coverage to areas such as rollover IRAs, the law regarding employer-sponsored retirement plans, commonly known as ERISA, still requires all individuals providing investment advice to an employer-funded retirement plan to adhere to a fiduciary standard.[48] And in 2019, the CFP Board caused tsunami-sized waves in the industry with the announcement of an impending fiduciary standard for any individual holding a CFP designation.[49] Recently, six states, with Massachusetts leading the charge, have announced plans to impose fiduciary liability for all financial professionals providing advice, including broker-dealers.[50] Other states, like New Jersey, are also proposing expanded coverage of the fiduciary rule.[51] And other regulatory agencies, such as the Consumer Financial Protection Bureau (a federal watchdog agency created during the Obama administration), have made similar noises towards a uniform fiduciary standard.[52]

EMERGENCE OF A NEW BEST INTEREST STANDARD

47. *See supra* note 10; *see also supra* note 13; *see also* SECRETARY OF THE COMMONWEALTH OF MASSACHUSETTS, *Preliminary Solicitation of Public Comments: Fiduciary Conduct Standard for Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives* (June 14, 2019), https://www.sec.state.ma.us/sct/sctfiduciaryconductstandard/fiduciaryconductstandardidx.htm.

48. *See Meeting Your Fiduciary Responsibilities*, *supra* note 12.

49. *See supra* note 13; *see also Driving Public Policy, Our Priorities*, CFP BOARD https://www.cfp.net/public-policy/public-policy-issues/fiduciary-standard. Like the DOL proposed regulation, this rule has fierce opposition, and its effective date has been delayed by over 1 year from the originally proposed date as the CFP Board and industry groups work together and clarify the regulations. Melanie Wadell, *FPA Calls for CFP Board to Delay Enforcement of New Ethics Standards*, THINKADVISOR, (July 9, 2019, 3:21 PM) https://www.thinkadvisor.com/2019/07/09/fpa-calls-for-cfp-board-to-delay-enforcement-of-new-ethics-standards/; Andrew Welsch, *Will Edward Jones Stop Advisors From Using the CFP Designation*, ONWALLSTREET, (June 3, 2019, 4:15 PM), https://onwallstreet.financial-planning.com/news/will-edward-jones-stop-advisors-from-using-the-cfp-designation.

50. Bruce Kelly, *Morgan Stanley Threatens to Pull Out of Nevada Over State's Fiduciary Rule*, INVESTMENTNEWS, (Mar. 13, 4:44 PM), https://www.investmentnews.com/article/20190313/FREE/190319968/morgan-stanley-threatens-to-pull-out-of-nevada-over-states-fiduciary; *see also* SECRETARY OF THE COMMONWEALTH OF MASSACHUSETTS, *Preliminary Solicitation of Public Comments: Fiduciary Conduct Standard for Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives* (June 14, 2019), https://www.sec.state.ma.us/sct/sctfiduciaryconductstandard/fiduciaryconductstandardidx.htm.

51. N.J. DIV. OF CONSUMER AFF., 51 N.J.R. 493(a), Volume 51, Issue 8, (proposed Apr. 15, 2019), https://www.njconsumeraffairs.gov/Proposals/Pages/bos-04152019-proposal.aspx (last visited on Oct. 21, 2020).

52. Lorie Konish, *With Major Financial Protections on Hold, Here's How You Can Guard Your Investments*, CNBC, (Jan. 6, 2019 11:00 AM), https://www.cnbc.com/2019/01/04/with-consumer-protections-in-limbo-heres-how-you-can-guard-your-investments.html.

However, we cannot ignore that the large financial institutions and lobbying organizations have had some success in blocking fiduciary progress. For nearly a decade, they were able to delay action on Section 913 of the Dodd-Frank Act. This provision directed the SEC to study the need for establishing a uniform federal fiduciary standard of care for brokers and investment advisers providing personalized investment advice.[53] Further, it is these organizations that led the legal fight against, and ultimately killed, the original attempt to impose a uniform fiduciary standard on financial representatives by the DOL.[54] In an attempt to compromise with these opponents while still moving the needle towards a higher standard, some regulatory bodies have taken the path of "less" resistance by instituting what is now known as "best interest" regulations.[55] These regulations require some groups of financial professionals to act in the client's best interest, among other requirements.[56] The use of the term "best interest" as something separate from a fiduciary standard has caused confusion in the industry, since the fiduciary standard has been known to mean "serving in the client's best interest", or simply, the "best interest standard."[57] Rather than adopting a uniform federal fiduciary standard of care for brokers and investment advisers as suggested in the Dodd-Frank legislation, a best interest standard that covers broker-dealers was adopted by the SEC in June of 2019 and is now commonly referred to as Regulation Best Interest ("Reg BI").[58] Reg BI imposes the best interest standard on all

53. *See generally* Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 Fed. Reg. 33,318, 33,329-30 (July 12, 2019) (codified at 17 C.F.R. pt. 240) ("The Commission is adopting Regulation Best Interest pursuant to the express and broad grant of rulemaking authority in Section 913(f) of the Dodd-Frank Act.").

54. Mark Schoeff, Jr., *A Historical Timeline of Fiduciary Duty for Financial Advice*, InvestmentNews, (Mar. 15, 2016), https://www.investmentnews.com/historical-timeline-of-fiduciary-duty-for-financial-advice-66755.; *see also* Bruce Kelly, *Morgan Stanley Threatens to Pull Out of Nevada Over State's Fiduciary Rule*, INVESTMENTNEWS, (Mar. 13, 2019), https://www.investmentnews.com/article/20190313/FREE/190319968/morgan-stanley-threatens-to-pull-out-of-nevada-over-states-fiduciary.

55. *See* Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 Fed. Reg. 33,318; *see also* New York Superintendent of Financial Services, First Amendment to 11 NYCRR 224 (July 17, 2018), https://www.dfs.ny.gov/docs/insurance/r_finala/2018/rf187a1txt.pdf (Proposes to hold individuals selling or providing advice related to life insurance policies to a best interest standard that is similar to a fiduciary standard.).

56. *See* Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 Fed. Reg. 33,318; *see also* First Amendment to 11 NYCRR 224, *supra* note 53.

57. *See* Commission Interpretation Regarding Standard of Conduct for Investment Advisers, 84 Red. Reg. 33669 (June 5, 2019) (codified at 17 C.F.R. pt. 276).

58. Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 Fed. Reg. 33,318; *see also* Bradley Berman, Anna T. Pinedo, and Michael D. Russo, *Regulation Best Interest*, Harvard Law School Forum on Corporate Governance and Financial Regulation, (June 19, 2019), https://corpgov.law.harvard.edu/2019/06/19/regulation-best-interest/.

registered representatives and broker-dealers providing investment advice, even those providing solely incidental advice.[59]

Interestingly, the SEC defines exactly what processes and actions constitute meeting the best interest standard.[60] While the SEC stopped short of labeling Reg BI a fiduciary standard, SEC Chairman Jay Clayton specified that Reg BI purposely drew from fiduciary principles, such as the duty to disclose material information, eliminate or mitigate conflicts, and make recommendations in the client's best interest.[61] Reg BI is more prescriptive than the fiduciary standard in that it explicitly outlines four requirements that must be complied with in order to satisfy the standard.[62] Significantly, Reg BI does not require elimination of all conflicts of interest, but only requires written policies and procedures "reasonably designed to identify and at minimum *disclose or eliminate* conflicts of interest" (emphasis added).[63]

Other regulatory agencies have jumped on the best interest bandwagon. The state of New York recently passed the "Suitability and Best Interests in Life Insurance and Annuity Transactions" regulation, otherwise known as "Reg 187."[64] Reg 187 requires individuals making recommendations regarding the sale of or transactions related to life insurance policies or annuities to act in the consumer's

59. *Id.*

60. James Clayton, Chairman, SEC, Regulation Best Interest and The Investment Adviser Fiduciary Duty: Two Strong Standards That Protect and Provide Choice for Main Street Investors, (July 8, 2019) (Reg BI requires satisfaction of four requirements: disclosure, care, conflict of interest, and compliance.)

61. *Id*. (Reg. BI imposes a best interest standard upon broker-dealers that is higher than the current suitability standard, and draws from fiduciary principles which require the broker-dealer to act in the best interests of their clients.).

62. Hester M. Pierce, Commissioner, SEC, What's in a Name? Regulation Best Interest v. Fiduciary, (July 24, 2018) ("[T]he best interest obligation shall be satisfied if: (i) the broker-dealer reasonably discloses to the retail customer … the material facts relating to the scope and terms of the relationship with the retail customer and all material conflicts of interest that are associated with the recommendation; (ii) the broker-dealer, in making the recommendation, exercises reasonable diligence, care, skill, and prudence; (iii) the broker-dealer establishes, maintains, and enforces written policies and procedures reasonably designed to identify and at a minimum disclose, or eliminate, all material conflicts of interest that are associated with such recommendations; and (iv) the broker-dealer establishes, maintains, and enforces written policies and procedures reasonably designed to identify and disclose ***and mitigate, or eliminate***, material conflicts of interest arising from financial incentives associated with such recommendations.").

63. *Id.* (Under Reg BI, the broker-dealer must establish, maintains, and enforce "written policies and procedures reasonably designed to identify and disclose ***and mitigate, or eliminate***, material conflicts of interest arising from financial incentives associated with such recommendations."), (citing proposed rule 15*l*-1 under the Securities Exchange Act of 1934 (17 CFR 240.15*L*-1) (emphasis added).

64. N.Y. Comp. Codes R. & Regs. tit. 11, § 224 (2019).

best interest.[65] Like Reg BI, Reg 187 is very prescriptive in setting forth requirements for meeting this standard.[66] Further, Reg 187 also sounds very much like a fiduciary standard by requiring the individual making the recommendation to act in the client's best interests, act with due care, ensure the recommendation is suitable, and ensure the client is aware of any conflicts of interest.[67]

As we noted earlier, the term "best interest" is routinely used at common law to describe the fiduciary requirements of loyalty and fairness. To imply in the regulatory world that "best interest" and "fiduciary" aren't commonly understood to be the same standard creates confusion for the parties subject to the regulation, and will create difficulty for courts to interpret these terms differently. This begs the question – are the two standards really that different? When addressing the best interest vs. fiduciary issue, SEC Commissioner Hester Pierce downplays the tension created by the terms' similarity[68] and instead encourages financial professionals and clients to focus on the substance of the services rendered to determine whether the best interest standard has been met.[69] Although Commissioner Pierce glosses over the weight of the terms used, she is one of the few individuals who has ventured to clarify how the best interest and fiduciary standards actually differ. She notes that there are two substantive differences between the two standards – first, the fiduciary standard requires the fiduciary to provide ongoing and continuous advice as appropriate, while the best interest standard may only apply to circumstances at a point in time; and second, the best interest standards have slightly different restrictions regarding conflicts of interest.[70] While this is helpful commentary, this distinction lacks real substance. As we noted earlier, the fiduciary duty to continuously monitor client accounts can be limited by reducing the scope of the engagement.[71] While the best interest standards are more prescriptive regarding conflicts of interest, the final Reg BI wording clearly states that the regulation aims

65. *Id.*; *see also* Peter Molinaro, Esq., REGULATION 187 NEW YORK'S BEST INTEREST STANDARD, NAIFA-NYS (2019), https://naifanys.org/wp-content/uploads/2019/07/PowerPointReg187.pdf.

66. N.Y. Comp. Codes R. & Regs. tit. 11, §§ 224-226 (2019); *see also* Peter Molinaro, Esq., REGULATION 187 NEW YORK'S BEST INTEREST STANDARD, NAIFA-NYS (2019), https://naifanys.org/wp-content/uploads/2019/07/PowerPointReg187.pdf.

67. *Id.*

68. H Pierce, *supra* note 60.

69. *Id.* ("We—as regulators—and you—as advisers and brokers—ought to make an effort to encourage investors to look beyond nice terms to the substance of what their financial professional is doing . . . .").

70. *Id.* ("[O]nly two differences stand out. First, an adviser generally has an ongoing duty to monitor over the course of its relationship with its client, while a broker-dealer generally does not. Second, a broker-dealer must either mitigate or eliminate any material financial conflict of interest it may have with its client.").

71. *See* Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Investment Advisers Act of 1940 Release No. IA-5325 (July 12, 2019), https://www.sec.gov/rules/interp/2019/ia-5248.pdf.

to identify and "disclose OR eliminate" conflicts.[72] The ultimate result is the same as the fiduciary standard, which allows an advisor to continue with a conflict as long as it is properly disclosed to a client.[73] Reg BI appears to be, simply, the fiduciary standard in a convenient checklist format. We all know the phrase "if it looks like a duck, walks like a duck, and sounds like a duck, then it's probably a duck." While the best interest standard may not be the same species as a fiduciary duck, it is certainly within the same genus.

The parsing of words such as "best interest" and "fiduciary" are not just interesting issues that may or may not come up in future litigation. These issues are applicable now because they can often overlap. Consider this example. A New York representative of a financial service company is licensed as a life insurance agent and as a registered representative of her company's broker-dealer. She has earned her CFP designation as well. Say she sells a client a variable annuity. What is required of her to fulfill her regulatory duties under these new rules? New York's new Reg. 187 subjects her and her insurance company to a best interest standard, and she is expected to provide certain documentation under this regulation. The variable annuity is a security and consequently, she is also subject to the SEC's new Reg BI. Although both of these regulations require her to act in her client's best interest, they use different methodologies and have different expectations for how she must demonstrate compliance. Further, in one case, her insurance company must take certain actions to assure her compliance, but because the product is a security, her broker-dealer is also expected to have specific procedures. And, what about her requirements as a CFP? To maintain her designation, she is to be measured as a fiduciary. Assume something goes wrong with the sale, and her client wants to file a complaint. Is the representative's actions to be measured by the best interest standards of two different regulators plus the fiduciary standard of a disciplinary board? If a civil suit comes from the alleged wrong, will she be judged by the highest of the three different standards? Or will she be subjected to yet a fourth standard – New York's common law concerning insurance agents? While there is no easy answer, this example shows that the issues are front and center.

This review of the fiduciary and best interest regulations shows that the over-arching strategy for regulators is to include more and more of the financial services landscape under a fiduciary-type umbrella. But how does this increase in fiduciary responsibility apply when the advisor is binary rather than DNA-based? In the next section, we discuss whether a pure robo-advisor can meet this standard.

72. *See supra* note 60. (Under Reg BI, the broker-dealer must establish, maintains, and enforce "written policies and procedures reasonably designed to identify and disclose ***and mitigate, or eliminate***, material conflicts of interest arising from financial incentives associated with such recommendations."), (citing proposed rule 15*l*-1 under the Securities Exchange Act of 1934 (17 CFR 240.15*L*-1) (emphasis added).

73. *See* SEC Commission Interpretation Regarding Standard of Conduct for Investment Advisers, 17 C.F.R. § 276.2.C (2019).

ROBO-ADVISORS AND LIABILITY STANDARDS

In recent years, robo-advisors have exploded in popularity. The Aite Group estimates that assets on digital investment management platforms was around US $257 billion at the end of 2018, and that client assets under management on robo-advice platforms will reach US $1.26 trillion by 2023.[74] This is largely because robo-advised services are typically offered at a lower cost compared to a human advisor, making advisor services more accessible to a broader population.[75] In addition, robo-advisors are arguably more effective than human advisors at some services, such as continual monitoring and rebalancing of client accounts.[76] This model theoretically frees up human advisors to focus on more financially complex client services, which require a stronger advisor-client relationship and specialized attention.[77] As financial advising technology evolves alongside an evolving liability landscape, we must consider how and if pure robo-advisors can meet the applicable liability standard. In this section, we first discuss what liability standard would apply to robo-advisors, then whether robo-advisors can meet this standard.

CAN A ROBO-ADVISOR MEET THE FIDUCIARY STANDARD?

As we discussed in Section II, advisors covered under the Investment Advisor Act of 1940 are held to a fiduciary standard. There is much regulatory and judicial support for defining robo-advisors as advisors under the Act, and therefore to hold them to a fiduciary standard. The definitive answer came from the SEC, who determined that robo-advisors meeting the definition of an advisor under the Investment Advisor Act of 1940 are considered registered investment advisers (RIAs).[78] Therefore, the SEC holds these robo-advisors to a fiduciary standard, as

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74. Alois Pirker, *US Digital Investment Management Market Monitor, Q2 2019*, *Report Summary, Aite Group*, (May 22, 2019), https://www.aitegroup.com/report/us-digital-investment-management-market-monitor-q2-2019.

75. *See* Cheng, *supra* note 1. ("Because artificial intelligence replaces human intervention almost entirely, costs for these kinds of services are reduced to a minimum. This has opened the door to the world of investment for people that can't afford a financial advisor made of flesh and bones—the key to the success of robo-advisors, especially in the United States.").

76. Barbara Friedberg, *What Robo-Advisors Can Do Better (and Worse) than Financial Advisors*, The Balance, (June 25, 2019), https://www.thebalance.com/what-robo-advisors-do-better-than-financial-advisors-4154903.

77. *See* Cheng, *supra* note 1. ("Still … (w)hat seems to remain a very important success factor in the financial advisory business is personalization. People have emotions and insecurities that need to be addressed, a quality that no machine can yet provide.").

78. *Investor Bulletin: Robo-Advisers*, SECURITIES AND EXCHANGE COMMISSION, (Feb. 23, 2017) https://www.sec.gov/oiea/investor-alerts-bulletins/ib_robo-advisers.html. ("Although the services that they provide are automated, robo-advisers in the U.S. must comply with the securities laws applicable to SEC or state-registered investment advisers.").

are all other RIAs.[79] The SEC has published additional guidance specifically for robo-advisors that may assist them in meeting this fiduciary standard.[80] This guidance focused heavily on the development and testing of the algorithms that power the robo-advisor.[81] In addition, though sparse, case law and rulings support holding robo-advisors to a fiduciary standard.[82]

Although it's clear that robo-advisors can be held to a fiduciary standard, whether or not a "pure" robo-advisor (that is, one that lacks any human advising component) can actually meet the standard requires more analysis. This analysis will suggest that pure robo-advisors are indeed capable of being fiduciaries when they are being engaged for limited services such as the creation and monitoring of an investment portfolio. When the service involves broad scale on-going financial planning, the ability of a pure robo-advisor to successfully act as a fiduciary is more questionable. We will begin by discussing the duties of care and loyalty in a pure robo-advising context.

DUTY OF CARE

Recall that the duty of care requires the advisor to make prudent recommendations based on the client's needs, goals, and appropriate research, and requires the advisor to provide ongoing monitoring within the scope of the client agreement.[83] Significant debate centers around the robo-advisor's ability to meet the prudent recommendation requirement. In the following sections, we discuss the ability of robo-advice in meeting the prudent recommendation requirement in more depth.

First, we discuss the deficiencies of the robo-advisor questionnaire and the inability of the robo-advisor to proactively seek out information. Next, we discuss the inability of the robo-advisor to utilize human judgement. Finally, we address the arguments that highlight how a robo-advisor can meet the fiduciary standard, in many ways exceeding the abilities of a human advisor.

79. The SEC has successfully litigated against 2 robo-advisors for violating the Investment Advisors Act of 1940. *See SEC Charges Two Robo-Advisors With False Disclosures*, Securities and Exchange Commission, (Dec. 21, 2018) https://www.sec.gov/news/press-release/2018-300.

80. *Guidance Update*, DIVISION OF INVESTMENT MANAGEMENT, SECURITIES AND EXCHANGE COMMISSION at 1 (Feb. 2017), https://www.sec.gov/investment/im-guidance-2017-02.pdf.

81. *Id.* at 3-4.

82. Sergeants Benevolent Ass'n Annuity Fund; AXA Rosenberg Group, LLC, S.E.C. No. 3-14224 (2011).

83. *See supra* note 18, at 10-20.

Robo-Advisors Cannot Make Prudent Recommendations Because the Questionnaire is too Limited

The insufficiency of the questionnaire the robo-advisor uses to gather information about the client and formulate a recommendation is at the core of the robo-advisor's inability to meet the duty of care. First, there is no generally accepted standard for these questionnaires. Second, many robo-questionnaires are too limited in scope and do not allow the client to ask questions, which results in incomplete information upon which the robo-advisor builds the investment recommendations and an inability. Third, the advice recommended by the robo-advisor is not personalized to each individual client.

Robo-Advice Questionnaires May Not Be Effective

Questionnaires vary widely in terms of length, question type, question topic, and the like.[84] While some questionnaires inquire broadly about the client's personal circumstances, risk tolerance, and investment horizon, others may ask questions that are more limited and based on a certain outcome.[85] In a Joint Investor Alert on Automated Advice issued by the SEC and FINRA, the agencies cautioned that questions on the survey can be "over-generalized, ambiguous, [or] misleading[.]"[86] There is no consistency or industry-wide best practice to differentiate a good questionnaire from a poorly constructed one. In addition, the robo-advisor has no way of confirming through supporting documentation if the information provided is accurate,[87] and may not be programmed to spot inconsistent answers and ask the client clarifying questions.[88] Simply stated, the challenge with questionnaires is the old adage "garbage in; garbage out."

Robo-Advice is Based on Limited Data

Since the data is limited only to the specific questions asked, the universe of information upon which the robo-advisor generates recommendations is quite limited. If questionnaires fail to gather sufficient or accurate information, there is a high likelihood that the advice provided will not meet the duty of care. Vital

84. FINRA, *Report on Digital Investment Advice* at 8 (Mar. 2016), https://www.finra.org/sites/default/files/digital-investment-advice-report.pdf; *see also Investor Bulletin: Robo-Advisers*, *supra* note 76, at 6.

85. *Guidance Update*, *supra* note 78, at 6.

86. *Investor Alert: Automated Investment Tools*, U.S. SECURITIES AND EXCHANGE COMMISSION (May 8, 2015), https://www.sec.gov/oiea/investor-alerts-bulletins/autolistingtoolshtm.html.

87. Mass. Sec. Div., *Policy Statement, Robo-Advisers and State Investment Adviser Registration* at 5 (Apr. 1, 2015), https://www.sec.state.ma.us/sct/sctpdf/Policy-Statement—Robo-Advisers-and-State-Investment-Adviser-Registration.pdf.

88. *Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, *supra* note 18, at 6-7.

information can be easily missed.[89] In addition, the robo-advisor cannot seek out information that exists outside of the questionnaire, and this prevents the robo-advisor from obtaining crucial information about the client. While a human advisor can ask follow up questions, probe deeper into a topic if necessary, or ask for background information and context, many questionnaires do not seek out supplementary information or allow a client to provide more detail.[90] Sometimes in the course of doing a financial plan, the planner may unearth a new question whose answer is impactful on the ultimate recommendation. Law Professor Arthur Laby also notes that humans cannot share anticipated events with the robo-advisor.[91] This inability to proactively seek out or act upon more information is a major roadblock to providing truly prudent advice.[92]

A related aspect to the limitations of the questionnaire is that the questionnaires do not allow the client to ask questions, and the robo-advisor cannot discern whether the client understands the questions being asked or what is being recommended.[93] One industry expert, Scott MacKillop, wrote

> Then there is the problem of properly identifying a client's goals. What if a client isn't really sure about her goals or has a problem articulating her goals? What if a client has multiple goals? What if the client has conflicting goals? What if there's a gap between an investor's tolerance for risk and the amount of risk he needs to take to reach his goal? What if the investor simply doesn't understand some of the 10 or 15 questions on the questionnaire? What if they think they understand the questions, but really don't?[94]

If a client cannot ask questions, they may not understand what is being asked, and they are more likely to respond incorrectly, which will lead to lower quality or improper advice, thus failing the prudent recommendation requirement.

Robo-Advisors Cannot Make Personalized Recommendations

Many experts argue robo-advisors cannot make prudent recommendations because they are designed to generate advice based on a pre-determined customer

89. Ji, *supra* note 7, at 1543.
90. *Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, *supra* note 18, at 6.
91. Tara Siegel Bernard, *The Pros and Cons of Using a Robot As An Investment Adviser*, N.Y. TIMES, (Apr. 29, 2016), https://www.nytimes.com/2016/04/30/your-money/the-pros-and-cons-of-using-a-robot-as-an-investment-adviser.html.
92. *Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, *supra* note 18, at 6.
93. *Id.*
94. Scott MacKillop, *Can A Robot Be A Fiduciary?,* THINKADVISOR (Jan. 30, 2017, 7:00 PM), https://www.thinkadvisor.com/2017/01/30/can-a-robot-be-a-fiduciary/.

profile that is determined by answers to a limited questionnaire.[95] When clients respond to the questionnaires on a robo-advisor platform, the robo-advisor assigns the client a pre-determined profile which should reflect the client's appetite for risk, goals, investment preferences, etc. Advice is then generated that should presumably match the client's profile characteristics. In FINRA's Report on Digital Investment Advice, it noted:

> Many of these tools match investors to a pre-packaged portfolio of securities based on their profile, i.e., investors with a conservative profile are placed in a conservative investment portfolio and investors with an aggressive profile are placed in an aggressive portfolio.[96]

However, in a study conducted by FINRA, they found that robo-advisors only have an average of five to eight different customer profiles into which they categorize thousands of clients.[97] It is hard to imagine that these limited profiles are truly representative of each client's individualized needs and goals, which is not aligned with the prudent recommendation standard to consider each client's individual circumstances.[98] In fact, the word "fiduciary" was interpreted by the Supreme Court into the Investment Advisor Act of 1940 specifically because the court recognized that investment advice should be "personalized" and because of the highly personal nature of the advisor-client relationship.[99] A robo-advisor, however, is simply not designed to deliver personal advice.

Robo-Advisors Cannot Make Prudent Recommendations Because They Lack Human Judgement

Another argument raised by many experts against a robo-advisor's ability to make prudent recommendations is the absence of human judgment. This is a tricky argument because there is no explicit regulation or judicial interpretation that requires an advisor to utilize human judgment to satisfy fiduciary duty.[100] However, many experts in this space argue that human judgment is critical because it allows

95. *Investor Bulletin: Robo-Advisers*, SECURITIES AND EXCHANGE COMMISSION, (Feb. 23, 2017) https://www.sec.gov/oiea/investor-alerts-bulletins/ib_robo-advisers.html ("A robo-adviser uses information you provide to create a recommendation. As a result, a robo-adviser's recommendation is limited by the information it requests and receives from you, typically through an online questionnaire. It is important to keep in mind that some robo-advisers may obtain and consider only limited information about you."); *see also Guidance Update*, *supra* note 78, at 6.

96. *Report on Digital Investment Advice, supra* note 82, at 6.

97. *Id.*

98. *See Interpretation Regarding Standard of Conduct for Investment Advisers*, SECURITIES AND EXCHANGE COMMISSION 13-14 (July 12, 2019), https://www.sec.gov/rules/interp/2019/ia-5248.pdf.

99. *Capital Gains Research*, 375 U.S. at 191 (1963).

100. Ji, *supra* note 7, at 1570.

advisors to gather more information about a client that is critical to make prudent recommendations. Compare scenarios where a couple uses a robo-advisor compared to a human advisor to set up a brokerage investment account with both spouses on the account. The human advisor may notice that the wife seems uncomfortable or angry during the meeting. The human advisor may probe deeper to uncover the source of this discomfort and may learn that the husband has significant creditor issues and a gambling problem. The advisor can then advise how to protect the assets in the account from the husband's creditors, which is clearly in both spouse's best interests. A robo-advisor would not have picked up on those cues. It is clear that human judgment is a valuable tool for an advisor to act in their clients' best interests.

As we noted, statutory authority does not explicitly require human judgment to meet the fiduciary standard. Perhaps the reason is as simple as former SEC Commissioner Kara M. Stein stated, "the concept [of robo-advisors] did not even exist when most of the laws applicable to investment advisers were drafted. Most of these laws are based on the idea of a human investment adviser on the other end of the phone or sitting across the table from you."[101] Human judgment was not explicitly written into the duty of care because it was assumed that humans would always be the advisor, and using human judgment is a natural human trait that did not need to be specified.

When Can a Robo-Advisor Make Prudent Recommendations?

Robo-advisor proponents have responded to these concerns about a robo-advisor's ability to meet the prudent recommendation standard with many effective arguments. These proponents argue robo-advisors can make prudent recommendations in limited scope engagements and could even surpass the abilities of a human advisor. In a white paper issued by Morgan-Lewis, their experts draw from trustee fiduciary principles to argue that robo-advisors can satisfy the duty of care, *as long as the engagement is limited in scope*.[102] In a limited engagement, a much more effective questionnaire can be crafted which addresses all relevant data, and therefore the robo-advisor can effectively make prudent recommendations.[103] In addition, limited scope engagements are extremely popular and are a commonly

101. Kara M. Stein, SEC Commissioner, Surfing the Wave: Technology, Innovation, and Competition - Remarks at Harvard Law School's Fidelity Guest Lecture Series (Nov. 9, 2015), https://www.sec.gov/news/speech/surfing-wave-technology-innovation-and-competition-remarks-harvard-law-schools-fidelity.

102. Jennifer L. Klass & Eric Perelman, *The Evolution of Advice: Digital Investment Advisers as Fiduciaries*, MORGAN LEWIS at 6-8 (2016), https://www.morganlewis.com/-/media/files/publication/report/im-the-evolution-of-advice-digital-investment-advisers-as-fiduciaries-october-2016.ashx?la=en&hash=7A28D9586FD8ACADC9731733BFE4281F4E6FEB49.

103. *Id.* at 2, 6-8, 16.

accepted practice. [104] However, Morgan-Lewis ignores that these limited engagements are typically based upon the *client's* needs and desires; they are not designed as a workaround to circumvent the deficiencies of the advisor. In addition, some experts take issue with this approach as a panacea to the fiduciary issue and argue that this scope limitation undermines the true intent of a fiduciary standard.[105] Scott MacKillop argues that

Being a fiduciary comes along with important obligations and duties to the client. You cannot maintain that you are a fiduciary while disclaiming all the responsibilities that go along with that title.[106]

The Morgan Lewis experts remained silent regarding whether a robo-advisor could meet the standard in a broader, comprehensive advising context. [107] In general, however, it appears that robo-advisors are quite capable of fulfilling fiduciary responsibilities in situations where there is a limited scope engagement.

An additional argument is that a robo-advisor may be more effective at making prudent recommendations than a human advisor. The most glaring benefit of a robo-advisor is the sophistication of the machine's ability to evaluate limitless data and risk scenarios to develop an ideal efficient frontier investment portfolio. In days of yore, before the use of computers for financial analysis, financial advisors would manually develop these portfolio calculations, which were naturally based on less robust data and prone to human error. The advancement of computer technology has allowed for increasingly faster processing of calculations. In the area of investment portfolio design this has allowed for more effective modeling, and computers can outperform humans in this area at a quantum scale. Before computers, Monte Carlo simulations required a significant amount of time and were functionally unavailable for individual portfolio design. With the advent of the PC and faster processing chips, stochastic modelling is a normal aspect of investment portfolio design. Thus, with a carefully crafted fact finder that dives deeply into the transaction defined by the limited engagement, a robo-advisor can create a more informed investment portfolio than a human advisor.

In addition, recall that "(f)iduciary duty requires the advisor to update information periodically so that [their advice] can be adjusted to changing circumstances."[108] A robo-advisor could theoretically be programmed to gather data from a potentially unlimited number of sources: global markets, regulatory changes, industry news related to the client's business, the local economy, even news about the client's competitors, and instantly make adjustments to the client's portfolio or identify areas of risk. It is unlikely a human advisor would have the time or capability to keep abreast of all of these data sources. In this way, a robo-advisor

104. *Id.* at 7-8.
105. *See* MacKillop, *supra* note 92.
106. *Id.*
107. *See* Klass, *supra* note 100.
108. Suitability of Investment Advice Provided by Investment Advisers; Custodial Account Statements for Certain Advisory Clients, 59 Fed. Reg 13, 465 (proposed Mar. 22, 1994) (to be codified at 17 C.F.R. pt. 275).

can satisfy the ongoing monitoring requirement much more effectively and cheaply than a human advisor. While a human can only monitor an account periodically, a robo-advisor can continually monitor and adjust an account to maximize effectiveness. There is little risk that a robo-advisor, unless improperly programmed,[109] will miss an opportunity to rebalance, take advantage of a tax loss harvesting opportunity, or adjust investments in a timely manner.

DUTY OF LOYALTY

As we noted earlier, the duty of loyalty requires an advisor to act in the client's best interests, place the client's interests above the advisor's own interests, and avoid or mitigate conflicts of interest through "full and fair" disclosure of material information and to avoid misleading clients.[110] Robo-advisors can satisfy the duty of loyalty to a greater degree in some ways, such as eliminating advisor conflicts of interest, and ensuring sufficient disclosures are provided. But significant issues remain with regards to firm-level conflicts of interest and effectiveness of disclosures. In fact, the technological complexity of robo-advisors may cause these issues to be exacerbated and have a greater negative impact on the client population.

Robo-Advisors are Not Necessarily Free from Conflicts of Interest

Much of the support for robo-advisors comes from the idea that because robo-advisors are not susceptible to human biases or motivations, conflicts of interest can be eliminated.[111] While this may be correct, it only addresses the conflicts that arise directly between the advisor and the client. Conflicts at the firm-level, which are conflicts that arise due to the institution's practices, policies, or procedures, are not eliminated with the use of robo-advisors. In fact, robo-advisors can be, and often are, intentionally programmed to favor the institution by making recommendations that favor the institution's products, rebalance client portfolios in ways which will allow the institution to earn more fees, and otherwise make recommendations that benefit the firm.[112]

For example, Schwab's robo-advisor, SIP, was programmed to allocate between seven and thirty percent of every client's portfolio into cash, which was then invested by Schwab. Schwab earned significant revenue through this practice, but this was clearly not in the best interests of the clients, because while Schwab paid the client nominal interest on the cash deposits, the cash could have been invested more effectively and could have yielded much higher returns for the

109. *SEC Charges Two Robo-Advisors With False Disclosures*, SECURITIES AND EXCHANGE COMMISSION (Dec. 21, 2018), https://www.sec.gov/news/press-release/2018-300.
110. *See* Securities and Exchange Commission, Commission Interpretation Regarding Standard of Conduct for Investment Advisers, 17 C.F.R. § 276, 12-21 (2019), https://www.sec.gov/rules/interp/2019/ia-5248.pdf.
111. *See* Ji, *supra* note 7, at 1572.
112. *See id.* at 1572-73.

client.[113] Schwab was forced to amend this practice so that the client is treated more favorably, however practices like these are commonplace among all advisory firms.[114] And now, with the Schwab's acquisition of TD Ameritrade, a new issue arises with their robo platform. It has been suggested that he migration of TD Ameritrade digital advice clients into the Schwab fold would amount to a conflict of interest.[115] In fact, the impact of firm conflicts like the one above are arguably more detrimental than personal conflicts between an advisor and client because the number of clients impacted by the firm conflict is potentially exponentially higher.

There is a counter argument to this challenge. While conflicts can occur within a robo-advisor environment, these conflicts of interest are more readily detected because the conflict of interest in a robo-advisor originates from inappropriate program design. Whether innocently or nefariously created, the conflict is "hard wired" into the robo-advisor's recommendation. To the extent this violates the fiduciary duty of loyalty, it violates it for all clients in the same circumstances. Once discovered, it can be exposed and stopped. Robo-advising doesn't prevent negligent or fraudulent design, but it makes it easier to detect.

Robo-Advisor Disclosures Are Potentially Too Complex for Consumers to Understand

A second issue to discuss regarding robo-advisors meeting the duty of loyalty is the disclosure requirement. As we noted above, advisors must disclose any information that is material or that denotes a conflict of interest. In some ways, robo-advisors can provide disclosures more effectively than human advisors. Robo-advisor disclosures will always be consistent and complete. There is no risk that a robo-advisor will "forget" or intentionally fail to disclose an important fact, or that some clients will receive a different explanation of the disclosures than others. In fact, a robo-advisor can even utilize technology to emphasize specific information in the disclosures, such as putting some information in pop-up boxes, requiring the client to click "I Agree", or highlighting critical text.[116]

However, the effectiveness of a robo-advisor in providing disclosures is limited in two ways. First, there is no opportunity for the client to ask follow up questions, or no opportunity for the robo-advisor to discern if the client truly understands the disclosures through facial expressions or context.[117] Although the SEC explicitly states that an advisor is not required to ensure a client *understands* the disclosures, it does clarify that "it would not be consistent with an adviser's fiduciary duty to infer or accept client consent where the adviser was aware, or

113. *See id.* at 1575.
114. *See id.* at 1575-76.
115. Samuel Steinberger, *A Curious Consequence of Robo Integration*, WEALTHMANAGEMENT.COM (Nov. 27, 2019), https://www.wealthmanagement.com/technology/curious-consequence-robo-integration.
116. *Guidance Update*, *supra* note 78, at 5-6.
117. *Id.*

reasonably should have been aware, that the client did not understand the nature and import of the conflict."[118] The robo-advisor would be unable to rephrase or better explain the information when a client fails to understand the disclosure. Second, as we noted above, firm conflicts arise from a robo-advisor's programming. While best practices, regulatory guidance, and case law all require disclosures to be prominent, easy to read and understand, and written in plain language,[119] the complexity of a disclosure increases significantly when technology is implicated. One scholar notes

> …[S]ubstantial, and substantially complex, information that is pushed out to consumers via disclosure is not accompanied by any test to determine whether it is understood or appropriately used. Roboadvisers add an additional level of complexity to disclosure as a device."[120]

In addition to the normal and traditional disclosures, the SEC's guidance for robo-advisors, focuses heavily on the algorithms used to power the robo-advising platform.[121] The SEC recommends describing the algorithm's design, how it will be used, and what risks are posed by the algorithm's design.[122] The SEC requires that, in cases where conflicts are so complex that they cannot be disclosed clearly and specifically enough for a client to truly understand a conflict, the conflict should be either eliminated or "adequately mitigate(d), (i.e., modify practices to reduce [the conflict])."[123] Since research shows that most clients don't understand complex disclosures anyway,[124] it stands to reason that disclosures regarding software program design and algorithms would be even less comprehensible to retail consumers, rendering the disclosures moot.[125] In addition, while the SEC guidance is helpful, the scope of these disclosures is left unaddressed. As experts from Morgan Lewis note, an advisor may use "hundreds" of algorithms, with each having

118. *Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, *supra* note 18, at 13-14; Susanna Ripken, *The Dangers and Drawbacks of the Disclosure Antidote: Toward a More Substantive Approach to Securities Regulation*, 58 BAYLOR L. REV. 139, 146 (2006) ("In order for a disclosure system to be effective, not only must the information that is supplied be disclosed completely, clearly, and accurately, but it must also be read and comprehended by the consumer.").

119. *Guidance Update*, *supra* note 78, at 3.

120. Nicole G. Iannarone, *Rethinking Automated Investment Adviser Disclosure,* 50 U. TOL. L. REV. 433, 440 (2019).

121. *Guidance Update*, *supra* note 78, at 6.

122. *Id.*

123. *Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, *supra* note 18, at 34-35.

124. Iannarone, *supra* note 118, at 440 ("Consumers are overwhelmed by the sheer amount of information disclosed."). *See also* Ripken, *supra* note 116, at 146-47 ("[D]isclosure that is too long or complex to be comprehensible to the average person floods the individual with too much nonessential data and overloads the person with information that inhibits optimal decision-making.").

125. Anita K. Krug, *Downstream Securities Regulations*, 94 B.U. L. REV. 1589, 1647 (2014) (regulation should be tailored based on the needs of the client).

its own set of assumptions, risks, limitations, and conflicts.[126] Morgan Lewis contends that it would not be reasonable to provide full disclosures about each, and that the firm should disclose only what it deems material to making the recommendation.[127]

These challenges suggest that the robo-advisor is not a panacea for the ills that can arise when there is a fiduciary relationship between a client and the advisor. But, just as humans are capable of acting as a fiduciary, so too can a robo-advisor meet the fiduciary standard in the right situation. However, current technology suggests this standard is best met under limited circumstances. First, when the engagement is limited in scope, such as investment advice, the robo-advisor has design and monitoring abilities often superior to human capabilities. Second, when the creators of the advisor are themselves free of conflicts of interest, the robo-advisor offers a systematic means of delivering conflict-free advice. Finally, the robo-advice must be delivered with an eye towards clarity and simplicity rather than relying on disclosures and disclaimers. Specifically, when the nature of the recommendation is investment-based, the expectation is that the pure robo-advisor can be the client's investment advisor within the current regulatory regime. The recent proliferation of robo-advisors in the securities industry is empirical evidence of the validity of this proposition.

CAN A ROBO-ADVISOR MEET THE BEST INTEREST STANDARD?

Because the ability of a robo-advisor to meet the fiduciary standard is far from a settled matter, it would behoove us to consider whether robo-advisors can meet the new entrant to the liability field, the best interest standard. As we noted above, the SEC declined to provide a definition for Best Interest, but instead chose a prescriptive approach which detailed specific actions which, if complied with, would generally satisfy the Best Interest standard.[128] The Reg BI rule has four basic requirements: a disclosure obligation, care obligation, conflict of interest obligation, and compliance obligation.[129] The compliance obligation requires a broker-dealer to maintain and enforce policies and procedures that are reasonably designed to achieve compliance with Reg BI.[130] This obligation is largely procedural and we believe it could be satisfied in a robo-advisor context, so we will not discuss it at length here.

The disclosure obligation and care obligation are very similar to these duties under the fiduciary standard. In fact, the SEC has been clear that it drew heavily

126. Steven W. Stone et al., *SEC Weighs in on Robo-Advisers: Disclosure, Suitability, and Compliance Obligations*, MORGAN LEWIS (Mar. 14, 2017), https://www.morganlewis.com/pubs/sec-weighs-in-on-robo-advisers-disclosure-suitability-and-compliance-obligations.

127. *Id.*

128. Regulation Best Interest: The Broker-Dealer Standard of Conduct, Release No. 36-86031, 83 Fed. Reg. 21574, 54 (June 5, 2019) (to be codified at 17 C.F.R. pt. 240).

129. *Id.*

130. *Id.*

from fiduciary principles when drafting Reg BI.[131] In our view, the same concerns exist with a robo-advisor's ability to satisfy the duty of care and disclosure obligations under Reg BI as we noted above, but with one important exception. Recall that at least one expert opined that one of the substantive differences between Regulation BI and fiduciary duty was that a fiduciary has a duty to provide ongoing monitoring of a client's accounts, unless the scope of the client-advisor agreement was otherwise defined.[132] Regulation BI does not require ongoing monitoring. As we noted above, a robo-advisor would be well-suited to provide ongoing investment monitoring, even to a greater degree than an advisor. Therefore, a robo-advisor would likely satisfy the monitoring requirement with no issue because it is already able to perform monitoring at the fiduciary level.

With regards to the conflict of interest obligation, Reg BI explicitly addresses the firm conflict issue described above.[133] Under this obligation, the broker-dealer must prevent any material limitations on offerings, such as making recommendations only for proprietary products, from causing the financial professional to act in their own best interests.[134] This means that broker-dealers can offer limited or proprietary recommendations, but the advisor cannot personally receive an incentive for doing so. In other words, the advisor cannot make more money from recommending a proprietary product compared to a non-proprietary product.[135] Because the firm conflicts are clearly addressed, and personal motivations are not an issue, we believe robo-advisors can satisfy the conflict of interest obligation under Reg BI.

STATUTORY RECOMMENDATIONS

So, where does all of this statutory analysis this leave us? Robo-advisors are a critical part of the financial advising landscape, and will only continue to grow. The financial industry needs clarification on when and how robo-advisors will fit in with, and enhance, the providing of financial advice. As we have shown, robo-advisors meet the best interest standard, and in specific contexts, robo-advisors can meet the fiduciary standard to an even greater extent than human advisors. Rather than fight the tide of robo-advising by questioning its ability to mimic human

131. *Id.* at 1-2.

132. Pierce, *supra* note 60. ("[O]nly two differences stand out. First, an adviser generally has an ongoing duty to monitor over the course of its relationship with its client, while a broker-dealer generally does not. Second, a broker-dealer must either mitigate or eliminate any material financial conflict of interest it may have with its client.").

133. *Id.* ("written policies and procedures reasonably designed to identify and disclose ***and mitigate, or eliminate***, material conflicts of interest arising from financial incentives associated with such recommendations.").

134. Regulation Best Interest: The Broker-Dealer Standard of Conduct, Release No. 36-86031, 83 Fed. Reg. 21574, 15 (June 5, 2019) (to be codified at 17 C.F.R. pt. 240).

135. *Id.*

behaviors, we should support the use of robo-advice where and when it outshines its human colleagues.

We propose a new federal law specific to robo-advisors that highlights and supports the use of robo-advice in these specific contexts, while prohibiting pure robo-advice in the areas where its ability to meet the fiduciary standard is less clear. The statute should identify where robo-advisors are best used and should specify where human advisors must be utilized. Recall that the strengths of a robo-advisor are providing investment advice related to a limited-scope engagement, and continual monitoring and rebalancing of that specific account. Robo-advisors are then best suited for making portfolio recommendations related to specific assets, and monitoring, rebalancing and adjusting these accounts as necessary.

For any services that require more than this, a human advisor or a hybrid model should be required. As we noted above, a robo-advisor's greatest deficiency in meeting the fiduciary standard is in proactively gathering data, because if the questionnaire is ineffective or too limited, the advice is not personalized, and the robo-advisor cannot utilize human judgement to proactively seek out new information. For disciplines that require a broad fiduciary scope and information from dozens of aspects about the client's life and an ongoing relationship, like comprehensive financial planning, retirement planning, estate planning, or wealth management, this lack or insufficiency of information can lead to unfavorable results. We propose a statutory prohibition on the use of pure robo-advisors in these contexts. A hybrid model can be utilized in which the robo-advisor performs the services noted above, but the fact-finding and client relationship management aspects are managed by the human advisor. Among other ways to effectuate this policy, the law could be enforced by assigning liability at the firm level for failure to provide human oversight.

With a statute specifically designed to address the challenges and advancements posed by robo-advisor platforms, industry professionals and regulatory bodies will finally get the clarity and guidance that is so desperately needed.

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